IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRADUATE STUDENTS FOR ACADEMIC FREEDOM, INC., Plaintiff, v. UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA; and UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA LOCAL 1103 – GRADUATE STUDENTS UNITED AT THE UNIVERSITY OF CHICAGO, Defendants.	)	Case No. 24 C 6143 Chicago, Illinois December 19, 2024 1:54 p.m.

TRANSCRIPT OF PROCEEDINGS - MOTION HEARING
BEFORE THE HONORABLE JOHN F. KNESS

APPEARANCES:

For the Plaintiff:	JONES DAY BY: MR. HARRY S. GRAVER 51 Louisiana Avenue, N.W. Washington, D.C. 20001
For the Defendants:	DOWD, BLOCH, BENNETT, CERVONE, AUERBACH & YOKICH BY: MR. GEORGE A. LUSCOMBE III 8 S. Michigan Avenue, 19th Floor Chicago, Illinois 60603
Court Reporter:	NANCY C. LABELLA, CSR, RDR, FCRR Official Court Reporter 219 S. Dearborn Street, Room 2128 Chicago, Illinois 60604 (312) 435-6890 Nancy_LaBella@ilnd.uscourts.gov

* * * * * * * * * * * * * * * * * * * *

PROCEEDINGS REPORTED BY STENOTYPE
TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION

(Proceedings heard in open court:)

THE CLERK: 24 cv 6143, Graduate Students for Academic Freedom, Inc. v. United Electrical, Radio and Machine Workers of America.

THE COURT: Good afternoon. Why don't we come up to the podia. Plaintiffs on this side and defendants on this side, please.

And please state your names.

MR. LUSCOMBE: Good afternoon, your Honor. George Luscombe for the Union defendants.

THE COURT: Mr. Luscombe, good afternoon.

MR. GRAVER: Harry Graver for the plaintiff.

THE COURT: And good afternoon to you, Mr. Graver.

MR. GRAVER: Good afternoon.

THE COURT: Thank you all for being here. First, let me offer my sincere regrets for the late start for our hearing today. We had a court meeting, an administrative meeting that was scheduled to end a little before 1:30. It did not end a little before 1:30. And I'm sorry for keeping you all, but we had some matters we had to discuss. So I thank you for your patience.

We're here for, I guess we could call it an oral argument or just a hearing on the various pending motions in this case. This is not a Court of Appeals, so the argument will be a little more free-form. And it's really intended, at

least from my perspective, to help me focus on the positions of the parties and to understand how best to proceed. I will probably interrupt with a fair number of questions. But I thought we would start with the plaintiff and give you 15 minutes or so and then go to the defense and give you 15 minutes or so. And I'll interrupt as appropriate with questions. But I want you to take this opportunity to get me to focus on what you think are the most salient and beneficial points for your positions.

And we don't have green, yellow, and red buttons up here on your lectern, so we don't have to worry about that. The afternoon is yours. And I'm here to try to get a better understanding of the challenging and important legal questions in this case.

So with that preamble, if you're not arguing, you're free to sit at the table, or you're free to stand at the podium, either way. But I'll turn to the plaintiff and recognize you.

MR. GRAVER: I appreciate. Thank you, Judge Kness. Harry Graver for the plaintiff.

Graduate students at the University of Chicago are currently being put to a choice of following their conscience or continuing their academic work. That is so because the Union was able to use its powers under the NLRA to extract a collective bargaining agreement from the University that forces

every graduate student employee, whether they like it or not, to first pay the Union an agency fee before they can perform their research and teaching work. The results of that scheme are stark.

One of our members, Student B, has family right now fighting in Israel for the IDF. If Student B wants to be a research assistant for a law professor this year, Student B must first pay a fee to a union that is accusing his loved ones of committing genocide.

Or take Or Goldreich, who now, in order to still work as a teaching assistant, must send money to a group championing the BDS movement that targets his homeland of Israel. And as we detail in the complaint, these students are far, far from alone.

For its part, the Union says that whatever you might think of this, a federal court is powerless to do anything about it. On their view, the First Amendment does not apply here at all; and even if it did, they go so far as to say everything they're doing is perfectly constitutional. That is deeply wrong at both turns.

And if I may, I'll make three points at the start, two on the governmental action front, one on the merits.

So, first, the entire function of the governmental action doctrine is to ensure that people on the receiving end of government-backed power still retain their basic

constitutional rights. Otherwise, the government can freely violate people's rights at will and avoid judicial review by simply laundering its policy choices through nominally private action. And nowhere is that more so than here. A driving point behind the NLRA was to ensure that unions would be able to extract agency-fee provisions, like the one here, and accomplish that goal through a careful statutory scheme that makes them the reliable default.

And that brings me to point two. The best way to see that we are right on the law here is to look at the reality on the ground.

The governmental action doctrine is a very practical doctrine. If the NLRA was neutral or agnostic as to agency-fee provisions, you would expect to see a diversity of experience on the ground, as you see with virtually every other clause in a collective bargaining agreement; but you don't because the Act isn't.

And as my friends agree, agency fees are the overwhelming norm with virtually non-existent exceptions. Our basic point is that is not a coincidence. It is the clear and intended product of governmental action.

And the last main point I'd make to start is that on the merits, the most important thing to note is that the agency's fee scheme here presents a distinct First Amendment burden that the Supreme Court has never addressed, let alone

sanctioned. When compelled association takes place within the four walls of the academy, that creates a distinct First Amendment infirmity, separate and apart from the associative burdens that already accompany an agency-fee scheme.

THE COURT: Let me jump in with a practical question, actually I have two unrelated questions.

But, first, it is noteworthy to me who isn't here as a party and that is the University. And do you think that matters?

MR. GRAVER: I don't think it matters. I think that we would be able to obtain -- our legal obligation, as a formal matter, is from our members as graduate student employees running towards the Union. And if this Court was to hold that that legal obligation was unlawful, then I think that the contractual enforcement mechanisms that would come with the University of Chicago would fall away.

The most practical way to look at it is the quasi settlement we have in place in this case now. We've agreed, in order to put the preliminary injunction proceeding to the side, that the Union would not enforce the agency-fee scheme here and would not go to the University of Chicago to enforce it as a condition of employment.

The exact same thing would happen in the event that this Court issues an injunction or a declaratory --

THE COURT REPORTER: Could you please slow down,

counsel.

MR. GRAVER: Oh, I'm sorry.

-- would issue an injunction or a declaratory remedy running towards the Union, extinguishing that legal obligation.

THE COURT: But if we talk about the question of state power, state actor power, why isn't the University -- why shouldn't they be here? It takes, as they say, two to tango. And, here, there is a labor agreement between the Union and the University. And the University presumably had to -- "had to" is not the right phrase. The University agreed to the agency-fee provision in the collective bargaining agreement. So why shouldn't they be here?

MR. GRAVER: Because I think the only group wielding government-backed power to visit the constitutional deprivation at issue here is the Union.

And I think this is a key point about how the bargaining system is structured. And my friends mentioned that this is a voluntary system; it takes two to tango. The key defining trait of a voluntary contractual system is where one party can freely say no, for a good reason, for a bad reason, for no reason at all.

That is fundamentally not the dynamic that the NLRA set up. The NLRA gave the Union tremendous power on the front end to extract an agency-fee provision like this and then superintended any rejection of that clause on the back end.

What happens is that they're put, essentially, to a yes or no to the employer. But in order for an employer to say no, he needs to marshal sufficiently good reason as supervised by the NLRB.

So the reason the University of Chicago doesn't need to be here is essentially the University of Chicago is getting bulldozed like everybody else. The key issue here is who is the governmental actor and who has the government thrown its weight behind. And the only --

THE COURT: So you're saying that because -- I want to make sure I have your argument straight -- because the University, even though it agreed to the CBA, it didn't really have a choice on this provision; so they said, fine, we'll go along with that. But we're really here because it's the Union, in your view, that is enrobed in this state actor power conferred by the NLRB through the statutory scheme?

MR. GRAVER: Exactly. It's who has the government thrown its weight behind. And it's thrown its weight behind the Union and the Union alone.

THE COURT: Okay. You can continue. Thank you.

MR. GRAVER: So I think that the last -- well, I'll stay on the governmental action point. I think it's worthwhile disentangling the step one, step two pieces of Lugar.

So with step one, the key point that we want to make is that the Union's ability to reach out and bind non-members

is a direct product of its powers under the NLRA, as its exclusive representative.

And I think the clearest way to see this is just to look at how the Supreme Court and the Seventh Circuit has described the powers at issue. As the Supreme Court put it, the NLRA creates a power vested in the chosen representative to bind non-members and gives the union powers not unlike a legislature to set the terms and conditions for employees.

So if turning a union into a mini legislature does not satisfy step one, I don't really know what does.

I think the real action in this case comes down to step two. And the NLRA -- the reason that the NLRA crosses the line into governmental action, why we're not in the mold of cases like Sullivan or Jackson, is that the NLRA specifically authorizes a type of agency-fee arrangement, forces it on the bargaining table, and says that an employer can only reject it if it proffers a sufficiently good reason.

All of that amounts to tremendous governmental pressure. And, again, that is completely by design. As the Supreme Court cataloged in Beck, this is exactly what Congress was going for.

So our basic point is a common sense one; it's that the Union cannot benefit from this massive government-backed cudgel with no strings attached. At the very least, it is bound by the strictures of the First Amendment and it cannot

use that cudgel to violate our members' First Amendment rights.

THE COURT: Let me ask you another sort of pragmatic question. And this could have absolutely zero relevance to your argument, but that's not going to stop me.

This being a university setting, it calls to mind some of the litigation that has occurred in this circuit over the -- I'm dating the issue a little bit here -- but over the COVID vaccine mandates and some of the COVID vaccine mandate related cases.

And I have a pretty clear recollection in one of the cases, I think it was Klaassen, K-l-a-a-s-s-e-n, or something like that, v. Indiana University, where some students with religious views did not want to be bound by the vaccine mandate that Indiana University had. And the Seventh Circuit said -- perhaps it was dicta -- in an opinion by Judge Easterbrook that -- the net comment was, well, you don't have to go to Indiana University.

So as a practical matter -- and maybe this doesn't matter -- should I be thinking along the lines that, well, these graduate students don't really have to go work as graduate teaching assistants at University of Chicago; they could go somewhere else?

MR. GRAVER: So a formal and functional answer to that. The formal answer is that at least in this First Amendment context, that's not the right way to think about it.

That's the Cruz case that we think we cite ultimately in a footnote. If a First Amendment violation is some part willed upon you -- you've decided to teach, you've decided to speak, you've decided to start a newspaper -- it is not as if the First Amendment falls away.

The practical answer, also, is that that doesn't describe a lot of our members' circumstances. As we talked about with someone like Or, Or is here on a student visa, he can't walk away from his teaching assistant job. And if he does so, he'll lose his visa and get kicked out of the country.

Or you have somebody like Student A who depends upon what that person receives as a research assistant in order to cover his costs of living. So the idea that, you know, they just want to -- like the choice is study bankruptcy or help a bankruptcy professor is a luxury and that, you know, you get it by pure, you know, state grace. They put that to the side even. Our students need to participate in these programs as a financial and legal matter as well.

But the more fundamental point -- and I think it's a point from Cruz -- that that's not exactly the right way to think about the First Amendment.

THE COURT: And that's fair. But while I have your time here -- your attention, rather, what do you make of footnote 24 in Janus; and, specifically, the tenor of that footnote might be read to be somewhat against your position.

The Supreme Court said: No First Amendment issue could have properly arisen in those cases -- I'm omitting the citations -- unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when Abood -- that's A-b-o-o-d -- was decided, and is even more questionable today.

How should I read that?

MR. GRAVER: I think -- I mean, I think you read it as written. Where I think Justice Alito might be skeptical that there's state action in this circumstance, consistent with his opinion in White, which makes all the sense in the world, because, you know, I think, as happened -- you don't think that you usually get it wrong on the circuit court when you're up there. No one was pressing private state action during Janus. And I think, though, a footnote is sort of just that. And for the purposes of a district court and for the purposes, for that matter, of the Seventh Circuit, there's always a danger in sort of reading the music that comes with a footnote. And the much better course is just to read the binding precedent as it exists today.

And as the Seventh Circuit at least has made clear, there is still state action, or governmental action, so long as the government throws its weight behind the activity at issue; so long as it consciously facilitates the activity at issue.

Maybe the Supreme Court wants to walk that back one day. It hasn't yet. The Seventh Circuit certainly hasn't.

So, noted as to the footnote, amongst friends it would be better if it wasn't there. But for purposes of rule of decision for deciding this case, I think that it is something that doesn't really play a role.

THE COURT: What do you think is the most on-point, binding authority for purposes of this case?

MR. GRAVER: I think that --

THE COURT: Let me be clearer, Mr. Graver. For purposes of this being read as a state actor question.

MR. GRAVER: Right. So I think that when it comes to binding authority, the cases that I think are most helpful for us are the civil peremptory challenge cases that culminate in the Supreme Court's Edmondson decision.

And, there, as here, you know, the government didn't force anyone to do anything. A party was free to use a peremptory challenge or not, just as parties here, as you noted at the start, are nominally free to participate in a contract. But the Court still found governmental action there because the government had developed a procedure to advance certain policies, and a private party used that procedure with significant assistance of the state. And I think those fundamentals are exactly present here.

THE COURT: Could it be argued, though, Mr. Graver,

that the facts were perhaps better in Edmonson for that point, given that we were talking about -- I think it was a judge that had to pass on whether the peremptory would actually be issued, right?

MR. GRAVER: So I think that's a different role for the state in that regard. The judge was sort of the enforcer in that one respect. But, on the other hand, it cuts the other way, in that the judge's role there was awfully ministerial. And Justice Kennedy at the beginning of Edmonson disclaimed, so long as the state is involved in just executing the remedy, we're not saying that causes state action. He disclaimed that point at the start. And it was a much more holistic analysis being like, why did the government set up a procedure like this? What are the policies the government is trying to advance? And what is the degree in which the state is involved?

And if you look at those fundamental principles, I think all of those are implicated here because the government has developed a very detailed bargaining scheme to advance specific labor policies and then makes itself available to be used by the union in order to advance those policies.

When an employer says no to an agency fee, the next stop is the NLRB to supervise that decision. The state is enmeshed in this procedure and, again, completely by design. This was not a coincidence that we're stumbling into that

agency fees are the overwhelming norm.

THE COURT: Could you slow down just a bit, please.

MR. GRAVER: Sorry.

This was entirely a policy decision set up by the federal government and accomplished with resounding success. Just the basic point though is that I think that's awfully good evidence that the government has put a lot of pressure here, and it's done so by intent.

THE COURT: I'm going to ask you to touch on two more points before we start thinking about changing horses here.

And one is the First Amendment substantive point, and then we'll come to the second one after you discuss that. Just your view of why you feel the First -- what role the First Amendment plays substantively and why you feel there's a violation here.

MR. GRAVER: So I think that any time you're dealing with compelled association, you are on risky First Amendment ground.

But I think the big question for this Court sort of is what -- why is this private-sector agency fee different from all other private-sector agency fees. And I think that what that involves is understanding what Hanson held and what it didn't hold. And this is a key point from Janus. What Justice Alito made very clear is that all Hanson did -- it was a very narrow decision in his words -- all Hanson did was reject a

facial challenge -- a facial challenge -- such that agency fees might, in some applications, be lawful.

So if you look at the -- I think what Hanson then lays out is sort of a spectrum of First Amendment options. You can imagine on one end of the spectrum a traditional private-sector union that might fall more comfortably into Hanson's holding.

Our basic point is that we are on the other end of the spectrum because the burdens suffered here are distinct. And the key reason why is that so long as compelled association stands in the way of being able to participate in core academic work, that is a separate First Amendment infirmity because the First Amendment independently protects academic freedom. So you have an additional First Amendment burden on one side of the ledger. And for this Court's purposes, I think that's very important. I think that almost ends the analysis because, again, my friend has not offered a single offsetting benefit on the other side of the ledger. They have not even tried to identify a justifying interest that could satisfy exacting scrutiny.

So, so as long as this Court recognizes -- this is a distinct First Amendment question; there are different burdens here than the garden-variety private-sector agency fee. And, based on the papers before me, there's zilch on the other side of the ledger. I think that makes this a straightforward and narrow First Amendment merits case.

THE COURT: Thank you. And then tell my why you think there are no genuine issues of material fact such that I could resolve this on summary judgment.

MR. GRAVER: So, I think that the main point where I think we end up talking past each other a little bit in the papers -- and why there's a -- my friend sort of asked for discovery -- is the idea that, yes, we agree that some of our members are at Chicago; yes, they agree that some of our members are bound by this contract; but, it sounds like there needs to be -- they've asked for discovery to figure out whether or not they are sincere, they really do object to this Union.

I don't think that has purchase in any event, for the reasons we detailed in the brief. But the real reason it doesn't have purchase is because sincerity is just doctrinally irrelevant. There's a reason that Janus -- Janus' holding and remedy applies to everyone in the country, whether or not they think -- had the same views as Mr. Janus about public-sector unions.

The analysis here is objective when it comes to compelled association. You look to the objective burdens versus the objective benefits. For instance, a federal law that says you have to give money to the Republican Party would be as unconstitutional if it applied to Republicans versus Democrats. It's not a person-by-person analysis. It's an

objective First Amendment analysis when it comes to compelled association.

So I think that's the main point, is that I just cannot find anything anywhere that is material that remains outstanding. I think it's a straightforward challenge. We have students at Chicago that are bound to a contract that violates their conscience. That's everything this Court needs to know factwise to figure out whether or not this is unlawful.

THE COURT: Thank you. I'll give you a few minutes to focus on some other things since I derailed you here.

MR. GRAVER: No.

I think I want to return a little bit to the state action point, or the governmental action point.

One thing that my friend brought up in his brief is there can't be governmental action here because unions were able to do this before the NLRA was passed. I think it's a worthwhile point to pause on.

The governmental -- at least at step one, none of this turns on whether the ability to obtain agency fees is some novel pure creation of federal law. For purposes of step one, the question is, is the action at issue the product of an exercise of a right or privilege with its roots in federal law. And I think that, as a descriptive matter, is undoubtedly true here.

One point I would add, that I think is in the briefs

but could be pulled out a little clearer, is looking at the text of Section (a)(3). What happens with (a)(3) is that there's a general bar on collecting a -- or there's a general bar on employers discriminating against employees based on their union status. But then there's a carve-out. And the carve-out allows for agency-fee arrangements like that here. But the only group that can avail itself of a carve-out is the Section 9 representative, exclusive representative.

So when you are the Section 9 exclusive representative, you are the only show in town. And you're the only person who is able to avail themselves of that federal carve-out. That is by definition exercising a privilege with its source in federal law.

Step one is -- again, we say very preliminary inquiry -- whether federal law has any role to play. I think it's very naturally satisfied by that alone.

The other point I would make is just, when it comes to step two, the big part of this, I think, is what makes this case different from a case like Sullivan, different from a case like Jackson.

And the big difference, to my mind at least, is it's not just that the NLRA makes you a lot more powerful; It's not just that the NLRA makes you the exclusive representative, but that there is a conscious effort to train that power on agency fees in particular. And I think that's important because

agency fees stand somewhat alone when it comes to the NLRA's broader statutory scheme. It is the one specific contractual provision that the NLRA forces onto the bargaining table.

And it's worthwhile maybe contrasting two examples. One, the NLRA makes a mandatory subject of bargaining hours. But there's no content behind that command. It's a generic discussion that the two parties need to haggle out. An agency-fee provision is different in kind because the NLRA provides content to the sort of provision that can be allowed and then forces that provision onto the bargaining table for a "Yes," "No" from the employer. That sort of targeted assistance, that sort of deliberate support and that binary option that it forces upon the employer, supervised by the NLRB on the back end, separates agency-fee provisions from everything else that you would see within a routine contract. And I think it's further evidence of the government's targeted support for this kind of contractual term.

THE COURT: Let me ask you this, and this is based off of ignorance on my part, how exactly does the issue of having the NLRB pass on whether there's a good business reason for -- let's say, there was no agency fee -- how does that get before them? Is it after a contract has been reached that doesn't have that provision? Or is it during negotiations? And is there an unfair labor practice charge? Just practically, how does that work?

MR. GRAVER: I think practically -- and, you know, I might rely on my friend a little bit for this too -- is that you -- the NLRB, I believe, cannot act unless there's a complaint filed. I'm not sure there is a time limit when that claim necessarily needs to be filed, whether a bargain is first struck or whether negotiations have fallen through.

THE COURT: And on this point of -- and I'll recast your argument just so that I make sure I have it right, and you can correct me -- but on this point that the NLRB really puts a thumb on the scale that employers get hometowned when they try to not have an agency-fee arrangement in a CBA, is that something that we need discovery on? Is that a contested fact? Or do you think that the record as it exists now is sufficient for me to rule on it as a matter of law?

MR. GRAVER: No. But I think the basic point is a statutory one. It's looking at the government's intent by the scheme that it set up. So you're looking both at how the NLRA is structured and then you're looking at how the NLRB has discharged its command. And in Moose Lodge, Justice Rehnquist explained that when you're figuring out governmental action, you look at the whole kettle of fish. You look at both the statute, the -- how it's enforced. You look at the regulations. You look at it all.

And I think what is important -- and this is a pure legal point that doesn't need discovery -- is -- there's a part

in the papers where I think we're talking past each other, but the key part is that in order to reject an agency fee, you need to marshal a sufficiently good business justification.

And we were talking a little bit about how philosophical objections factor into this. Our only point is that you need to put forward a business justification. And a stand-alone philosophical objection does not count as that. You need something more. And as my friend agrees, that something more is not necessarily a small showing.

And I think if you take a step back, just be mindful about why this mandatory duty to bargain exists just in the first place. The whole idea here is to reach comprise and, in particular then, to stop labor strikes. So if philosophical objections alone could count, the scheme falls apart overnight because you can't bargain with a philosophical objection. It's first principles. It's philosophy. It's morals. You can't put that on the bargaining table. That's why it's necessary to put forward some economic rationale because that can get traded across terms. And that is not necessarily a small showing.

And the last piece -- and, again, this is not something that needs discovery; it's just a common sense piece -- is that, if you say no, you know to an almost certainty that you're going to get an unfair labor practices charge and you're going to be in years of litigation.

THE COURT: Well, it's that point that I'm wondering

whether we need to have discovery on. Because that's a statement you make, and it may be true, but how do I know that that's an uncontested fact? Maybe it's not a material fact. But being a trial-level Court, we look at things from this perspective a fair amount. And so when you make that statement that you know -- you, the employer -- know for an almost certainty that you're going to get an unfair labor practice charge if you try to not have an agency-fee arrangement. How do we know that?

MR. GRAVER: I think the basic point is that -- and I think all you need to do to see this is both look at the case law and just the frequency of litigation. I'm not saying necessarily for discovery. This is the litigation risk. And the litigation risk is by design in just the statutory structure. You know to a certainty that this is the sort of thing that you need to bargain with in good faith. You know to a certainty that good faith is sort of a pliable standard by design. And you know to a certainty that the union has a right to challenge your bargaining practices before the NLRB.

Now, granted, in a given case, you might feel like you have a great chance to win. But certainly your counterparty -- and this is not really something for discovery because it's union by union and party by party -- but you know to a certainty that your counterparty can drag you through years of litigation. Maybe that's not so frequent, maybe it's very

frequent. But the key point here is looking to see, what is the scheme the government set up; and, from that, what can we distill about their intent about where they threw their weight.

THE COURT: So your argument is that an employer who is trying to get a labor contract in place would look at the statutory scheme and say, well, I know I'm going to buy litigation uncertainty if I fight over this agency-fee issue; I don't really care because I don't have to pay it; the employees have to pay it; it's important to the union; it's cost-free for us, so just give it to them. Is that basically the argument?

MR. GRAVER: I mean, it happens a lot. The only footnote I would say is that there is a reason for an employer to care -- and I think it speaks to the pressure that the government has been able to create here -- is that, you might have a genuine philosophical objection. We collect cases where that's the case. Or it might be a retention problem. And I can give a very concrete example here. You know, the defining trade of the University of Chicago is institutional neutrality. They didn't want to agree to this. But that is not the kind of thing you can put on the bargaining table here.

And -- but they have very good reasons not to want to agree to it. It might be harder to get students, as much as it is harder for, you know, an employer to attract people if they know they need to contribute to a union, especially a union that violates your conscience. But it's all to say, is that

the government has been able to structure a system where the power on the other side of the table is so large and the scheme has such a heavy thumb on the scale that you never see these exceptions get bucked.

THE COURT: You did say, Mr. Graver, something along the lines of, we know that the university didn't want -- may not have wanted this. How do we know that? Where in the record is that?

MR. GRAVER: So we know that from the Union's own Instagram, which I believe they verified, is that they cataloged quite well the remaining sticking points that exist -- and we cite this in the complaint; it's one of the exhibits -- agency-fee provisions was one of the last holdout pieces here.

THE COURT: All right. Thank you. Why don't you take a minute or two to wrap up, and then I'm going to turn to Mr. Luscombe.

MR. GRAVER: I think the basic point that we want to make is that there's a common sense and practical element to governmental action doctrine. Here, the Union has received tremendous federal power. As the exclusive representative, it has the ability to extinguish how others organize their own affairs. It can force the University to the bargaining table. And, by statutory design, it can train that power on agency-fee provisions, exactly as Congress wanted.

Congress wanted to make sure that agencies would be able to eradicate free riders. And they accomplished that statutory goal with tremendous success. The basic point here, the entire reason the governmental action doctrine exists, is that when you are on the receiving end of that power -- when you are a non-member, when you are an individual student -- you still have some basic constitutional protections because, otherwise, the government will be free to launder its authority through nominally private actors to the compromise of your rights.

THE COURT: Thank you, Mr. Graver. You may stay here or have a seat. It's up to you.

MR. GRAVER: I might go back that way.

THE COURT: Mr. Luscombe.

MR. LUSCOMBE: Yes, good afternoon, your Honor. Again, George Luscombe for the Union defendants.

Plaintiff has an uphill climb here. They challenge a private union agency-fee agreement in a private public sector -- a private-sector, excuse me, collective bargaining agreement with a private-sector employer under the First Amendment. In the nearly a hundred years of the NLRA, no case has ever held that.

Simply put, as we've been discussing and that I'll begin my focusing on, is that there is no state action here and that the First Amendment simply does not apply.

As we've cited to your Honor, that is the strong majority view of the appellate courts, the cases we've cited in our briefs from the Second Circuit, the Third Circuit, the D.C. Circuit, and the Tenth Circuit. And it is also very much so what the Supreme Court in Janus in footnote 24 tilted its hand to. Of course, they did not decide the question; it was just a footnote; but I think it's a strong indication of what the Supreme Court thinks of this.

You asked opposing counsel what are -- what's their best case. And, tellingly, the best thing they can come up with is Edmonson, which is just strikingly different facts. To say that this case has anything to do with the state involvement involved in the peremptory challenges of potential jurors, they're just radically different situations. As the court in that case explained, it's not just that at the end it's the judge who dismisses the jurors, but it's the entire process of civil litigation is a state action, that is a traditional state power, that all of that is involved with the state. Collective bargaining between private employers and private unions is simply not anything like that.

THE COURT: Let me ask you, Mr. Luscombe, the pantheon of appellate decisions that you referred to -- and even maybe Supreme Court earlier decisions -- remind me, do any of those postdate the decision in Janus?

MR. LUSCOMBE: No, your Honor, none of them postdate

Janus.

THE COURT: Does that matter?

MR. LUSCOMBE: No, your Honor, I don't think it does. For the state action piece, it certainly doesn't matter because Janus did not decide the state action question. If anything, it tilted its hand to say -- Justice Alito tilted his hand to say that he believes his decision in White was correct.

And to the merits First Amendment decision, the Court very much distinguished and made clear that it was not making any decision for private-sector labor law; that it was limiting its issues to the public-sector labor law.

Now, we're not blind --

THE COURT: Well --

MR. LUSCOMBE: I'm sorry.

THE COURT: No, no, go ahead. I'm sorry.

MR. LUSCOMBE: I was going to say, we're not blind to the fact that the Court's view of the traditional justifications -- state interests of labor peace, preventing industrial strife, and the free rider issue -- that they have questioned those. We're not -- you know, that's, of course, true. But we think, you know, if this had to go up to the Courts -- because, again, I think it's not this Court, but it would have to be the Supreme Court to overrule Janus -- you know, we would have arguments why those interests have a different implication in the private sector.

THE COURT: Going back to the state actor test, the Lugar test and whether this can be fairly viewed as state action, you heard Mr. Graver's argument about why, from a common sense, practical viewpoint, this is a state action because, effectively, employers know -- and this employer knew -- that if they tried not to have an agency-fee arrangement in their CBA, they'd be buying an NLRB proceeding and would very likely lose that. Doesn't that at least move the needle somewhat towards a finding that this is not entirely a situation with private actors?

MR. LUSCOMBE: No, your Honor, I don't think so. I don't think it moves the needle at all.

First, preliminarily addressing the factual issues, you'll peruse their 56.1 statement and you won't see a thing about why the University of Chicago did or did not ultimately agree to an agency-fee clause. There's zilch in the record about that.

And if the reason that this employer specifically needed -- this employer specifically agreed to the agency-fee clause was dispositive of this case, we would absolutely need discovery on that.

The assumption that he makes that because agency-fee clauses -- and it's not uncommon that agency-fee clauses, union security agreements, dues checkoff -- come at the end of a contract cycle, isn't because, oh, the employer cares so much

about opposing it. Most employers really don't care, right? It is because they know that's a cudgel against the union. The employers hold that hostage to try and get economic concessions out of the union.

THE COURT: And where is there support in the record for that assertion?

MR. LUSCOMBE: So, I'm going outside the record as well, your Honor, if we're going there. But I'm just saying the assumption that the plaintiff is making, that because an employer waits to agree to that till the last day because the employer is so objectioned to it and feels compelled by law to agree to it, is just speculation and is wrong. So that point --

THE COURT: Before I forget --

MR. LUSCOMBE: Yes.

THE COURT: Let me interrupt you. You heard my practical question earlier. I simply don't know -- I've been involved tangentially in some labor negotiations -- but if there was a charge of an unfair labor practice for not wanting to include an agency-fee arrangement and that went up to the NLRB, how practically does that work? Where does it come in the life cycle of a negotiation, or after? Can you help me out with that?

MR. LUSCOMBE: Yeah, sure, your Honor.

All of this type of NLRB proceeding has to be started

by an unfair labor practice charge. In this case, it would presumably be filed by the Union. That has to be filed within six months of the alleged unfair labor practice. So in this case, it would be a 8(a)(5), duty to -- failure of the duty to bargain charge that would to be filed by, presumably the Union in this case, within six months.

Now, that -- generally, that would be filed in the course of bargaining because the union's need to file it would be if they're not getting to a contract because, in the union's view, the company is refusing to bargain in good faith.

THE COURT: So that would come about if, let's say at the bargaining table, a representative of the employer says, by the way, we're not agreeing to any agency fee; that's our position. Would that be the triggering event for a potential NLRB unfair practice charge?

MR. LUSCOMBE: So if --

THE COURT: Or would --

MR. LUSCOMBE: -- a union --

THE COURT: -- that impact --

MR. LUSCOMBE: If that -- if that was what the union filed its unfair labor practice charge about, the union could do it but the union would lose. That's the Phelps Dodge NLRB case that we cited. It is absolutely not -- and in no case cited by the plaintiff -- ever the case that an employer's stand-alone refusal to agree to an agency-fee clause is found

to be a bad faith bargaining charge -- or an actual bad faith bargaining violation. That's just simply not the law.

It is perfectly clear from cases that we cited, like H.K. Porter from the Supreme Court, that the NLRB cannot find an unfair labor practice charge simply because of the employer's refusal to agree to a mandatory subject of bargaining.

What the cases discuss is this: the duty to bargain in good faith polices the process of bargaining, not the substantive outcome of the terms of the agreement. It polices the process.

Some of the cases -- and I'll back up and say, and that's reviewed under a "totality of circumstances" review of the entire, overall bargaining conduct of the employer or the union. The union can file a -- its duty to bargain in good faith.

The duty to bargain is often described as the parties have to approach the bargaining table with a sincere intent to reach an agreement. And where the cases talk about finding suspicion in an employer's stated philosophical objection to an agency-fee clause, where the employer then refuses to bargain at all, refuses to discuss it because they just say, we have a philosophical objection, we're not going to do this, where the cases say, well, that's evidence -- not a finding of bad faith; that's simply evidence of overall bad faith if combined with

other evidence. Because employers generally don't have philosophical objections. Employers generally look at the dollars and cents of a deal.

And so when an employer simply says, I'm not going to talk about this because I just don't believe in it and so I'm not even going to talk about it; I'm not going to hear your compromises; I'm not going to discuss trading it back and forth for something else you want; I'm just not going to talk about it, they say that, the Board says, that's suspicious to us because if you can't articulate a legitimate business reason, if you're not even willing to say and explain your position, well, that suggests -- that's evidence that you're not really trying to come to an ultimate deal with the union. You're just using this -- because you know it's important to the union -- to frustrate getting the contract overall.

But even if we just have that, it's still not an unfair labor practice. It's still not a violation. The Board then has to look, well, is there other evidence. And if we -- that piece combined with other things can be evidence of bad faith bargaining.

THE COURT: Practically speaking, do you think that -- who has more support from the NLRB on this point, the agency-fee point, unions or employers? Who do you think tends to do better on this issue?

MR. LUSCOMBE: I think unions would be surprised to

think that they had a slam dunk at the NLRB if -- when employers are holding the cudgel of agency fee over them and saying, we're not going to agree to union security until you come to this kind of concession. Unions would be very surprised to know -- to think that the law was what the plaintiffs describe it as.

If they -- the plaintiffs say the bad faith bargaining law, good faith bargaining law creates a presumption in favor of agency fee, they can't point to a single case that says anything close to that because none exists. And if the Board ever went in that direction, the courts would slap them down very quickly, like the Supreme Court case in H.K. Porter.

THE COURT: For purposes of my reviewing these various motions, it seems to me that both the Supreme Court in Beck and the Seventh Circuit in the Wegscheid, W-e-g-s-c-h-e-i-d, case seemed to decline to answer the issue on state action -- or state actor status that we have present here. That's my tentative read of it. Do you agree that the issue has not been squarely addressed?

MR. LUSCOMBE: In the Seventh Circuit, the state action question here has not been answered, that is correct.

THE COURT: Has it been answered squarely at an appellate level anywhere?

MR. LUSCOMBE: Yes. The state action question has been squarely rejected by the Third Circuit in the White

decision, the Second Circuit in the Price decision, the Tenth circuit in the Reid decision, and D.C. Circuit in the Kolinske decision.

THE COURT: I asked a bad question there. I'm familiar with those cases. I guess my question is, do you think that those are directly on point here?

MR. LUSCOMBE: Yes, I think those are directly on point --

THE COURT: All right. I wanted --

MR. LUSCOMBE: -- that there's no state action --

THE COURT: -- to make sure --

MR. LUSCOMBE: -- under the NLRA.

THE COURT: I wanted to make sure I understood your position there.

MR. LUSCOMBE: Yes.

THE COURT: If you could talk about the merits under the First Amendment for a bit, I would be grateful for that.

MR. LUSCOMBE: Of course.

So assuming that the First Amendment applies here at all, the Hanson case controls here, and its progeny. Now, what the Hanson case held is that an agency-fee agreement in a private-sector collective bargaining agreement -- in that case the RLA, but for these purposes there's no -- there's no principal difference between the RLA and the NLRA on this merits question -- that an agency-fee agreement that required

no more than all -- and even objecting employees pay their fair share of collective bargaining expenses, and where there's no evidence that the agency fee is being used on any political expenses to which the employees object, Hanson held that's constitutional. Okay.

It's correct, Hanson said we're just applying that to those facts, to that principle. If there were facts before us -- which there weren't in Hanson -- that the agency fee was actually being used on political expenses, we would have to decide that in another case.

THE COURT: Correct me if I'm wrong, but I think -- and I recognize that Janus was in a different posture and that you've argued that Hanson is more directly on point, but humor me. Didn't Janus sort of grapple with that issue and say, at least for purposes of that case, it was a broader associational, almost compelled speech issue that raised the First Amendment challenge? Do I have that much right?

MR. LUSCOMBE: Your Honor, I don't believe you do.

THE COURT: All right, correct me.

MR. LUSCOMBE: Yeah, I would argue that Janus, and Harris v. Quinn before it, were very careful to say, we're talking about the public sector here, not the private sector.

So, for example, there's the quote at page 920 of Janus -- and I apologize for the echo from the microphone -- at page 920, the Court wrote, largely quoting Harris, Assuming for

the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. In the public sector, core issues, such as wages, pensions, and benefits are important political issues. But that's generally not so in the private sector.

And there's other provisions in the case as well that address that point.

Now, I understand that plaintiff can make arguments of trying to bring Janus into the private sector, but those are arguments that plaintiff, if they want to do it, are going to have to try and make to the Supreme Court itself to overrule Hanson and the cases that followed it.

THE COURT: All right. Thank you.

MR. LUSCOMBE: Yes.

So to finish that line on how Hanson gets to where we are at the NLRA, because I think it is important to track this, is Hanson left open the question of, okay, bring me -- if you bring us a case where agency fees are being used for political expenses that employees object to, that will be a different case.

Then we got the Supreme Court's decision in Street, where the Court expressly said, clear as day, okay, now we're addressing the question that was left open by Hanson; we have evidence here that the agency fee is being used for political

expenses over the objection of some employees.

And so what the Court said is this, it said, well, state action is here under the RLA, this does raise significant First Amendment concerns to us, but we can avoid those by reasonably interpreting, in that case Section 2, Eleventh of the Railway Labor Act, to say the statute does not permit a union, over an employee's objection, to use an agency fee for political expenses that the employee objects to. That's not permitted by the statute; therefore, we don't reach those constitutional questions.

Now, right, that's not a constitutional case. It's not making a First Amendment decision, as plaintiff points out and as Janus said. But what's the necessary implication of that holding?

The necessary implication is that the Court found that its interpretation of the statute was constitutional. What did the Court do? It said, by statute the only thing the union was allowed to use the agency fee for over an employee's objection were expenses germane to collective bargaining and contract administration. So you don't -- so that is necessarily constitutional if that's the interpretation that the Court adopted in order to avoid any constitutional questions. That's what the Doctrine of Constitutional Avoidance does for us, okay?

So then we get to Beck, which now we are in an NLRA

case. So the first thing the court said is, well, we're not going to touch these First Amendment issues because we don't need to; if we wanted to get there, we would have to start -- decide the state action question, which we're not going to.

Now, that court also cast doubt on whether it thought there was state action because it cited two cases where the court had found no state action in actions by private-sector unions.

One of those, Sadlowski, was an internal union matter, so that I see that -- that is distinguishable. Another case was Steelworkers v. Weber, which was where the court held that an affirmative action policy in a collective bargaining agreement, negotiated between an employer and a union, a mandatory subject of bargaining over which the employer had a duty to bargain, they said, no state action in that case. Somebody was trying to challenge it under the Equal Protection Clause, and the court said no state action.

So Beck -- that aside -- Beck said, okay, we don't need to get to that First Amendment question again, deciding whether there is or isn't state action, because we're going to interpret the words of Section 8(a)(3) of the NLRA the same as Section 2, Eleventh of the Railway Labor Act; that union can only use its agency-fee clause to collect fees over the objection of an employee to be used for expenses germane to collective bargaining and contract administration. They

adopted the same interpretation. If that interpretation is constitutional in the RLA, it's constitutional in the NLRA. Full stop. That's where we get here.

And in this case, despite their rhetoric, all of their allegations, some of which are not supported by their 56.1 statement as we point out, they have not pointed to any evidence that a single cent of any objecting member's agency fee here is being used on political expenses. And, in fact, they expressly disclaim that they're making any claim that we're using agency fees for anything that is not countenanced under the statute under Beck. Instead, they're taking the full-frontal attack on agency fees, which is a full-frontal attack on Beck, on Street, on Hanson, on Ellis, on these cases. If they want to overrule that law, they need to go to the Supreme Court.

THE COURT: Is there an associational concern here though, for the reasons that Mr. Graver talked about earlier, namely that -- recognizing that the plaintiffs are not members of the Union, but still their money is going toward the Union -- is there an associational issue with some of the more heated positions, political positions, taken by the Union? Or is that not a concern?

MR. LUSCOMBE: I think that's not a concern. That's, again, an issue that the cases, like Hanson, reject; that those -- that associational concern is not right. When all

you're doing is using the -- the employees having to pay their fair share of the economic matters of collective bargaining and contract administration, that does not violate the First Amendment in any -- based on the idea of compelled speech or association.

And, of course, as your Honor pointed out, they do not have to be members of the Union. You know, cases like General Motors of course made clear that all that they have to contribute is their fair share of those economic expenses. They're free to say anything they want to oppose the Union, oppose the Union's actions. They're free to teach, to research, whatever they want at the University, limited of course by what their bosses at the University say they'll pay them for, which I'm sure they don't think is a First Amendment violation. But the Union has no role in any kind of restriction on their teaching, on their researching. They're free to do that all day long.

THE COURT: All right, Mr. Luscombe, I'll give you a minute to wrap up, and then I'm going to give Mr. Graver just a couple of minutes to rebut, and then we'll move on.

MR. LUSCOMBE: Thank you, your Honor.

For much of what we've just been discussing, the overwhelming weight of authority here, from Supreme Court cases to the appellate court cases, the appellate court cases that have specifically addressed this square issue, there's no state

action here.

This is a case, as then-Judge Alito recognized in White, and the other appellate court recognized, where a union and private-sector employer are making a private decision that, yes, it's allowed by federal law, but that is not state action. These cases have also held, including Judge -- then-Judge Alito's decision in White, that even if the National Labor Relations Act puts a thumb on the scale, gives unions added bargaining leverage, court decisions, like Jackson, make clear that is not sufficient for state action.

Jackson's holding was even if the added leverage that a monopoly status gave a utility company, the utility company was able to use that leverage to force someone to accept the terms of their contract and have their electricity turned off, said that's not state action.

That added leverage that some government policy might give a private actor, that that private actor can use to do something that's permitted under law, that's not state action. That's what all of these cases say. And the plaintiff has not pointed to a single case to the contrary that's anywhere remotely close to this. Okay. So there's simply no state action.

The Supreme Court in Janus has said, you know, we're not -- very much pointed, that we're not interested in revisiting that question. This is something that there's not a

First Amendment concern here at all.

I think I walked through the issues about our merits argument on the First Amendment, and I'll leave it at that as well.

On the summary judgment issues, again, I will just point out, we brought up issues of 56(d) because of all these anonymous affidavits that the plaintiffs put forward. To be clear, their summary judgment motion should be denied regardless of the consideration of those anonymous affidavits. Our motion to dismiss should be granted. The summary judgment should be -- the summary judgment motion should be denied as moot or, on the merits, for the same reason. So, therefore, the Court doesn't need to get to those issues.

If plaintiff thinks and wants to rely on these issues of what specifically the University of Chicago did in this case or if it wants to try and create a record about what happens out in the world of collective bargaining, they didn't do it on their motion here. And they were required to bring all their evidence forward that they wanted to bring forward if they wanted their summary judgment motion granted. It's not there. It shouldn't be considered by the Court, and their motion for summary judgment should be denied.

Thank you, your Honor. I'll leave it there unless you have any other questions.

THE COURT: No. Thank you, Mr. Luscombe. I

appreciate it. You may remain standing or you may be seated, whatever you prefer.

Mr. Graver, I will give you a couple of minutes to make any points you would like to make.

MR. GRAVER: I appreciate it. I think I have five --

THE COURT: Go ahead.

MR. GRAVER: -- four-and-a-half.

So the first is on the governmental action point. My friend kept saying that no one agrees with us. I will spot him --

THE COURT: I'm going to give you the yellow flag caution for speed.

MR. GRAVER: Appreciate it.

My friend kept saying that no one has ever agreed with us. And I will spot him that more circuits have agreed with their position. But the First and the Fourth Circuits are on our side, and we talk about it a lot in the brief. So I don't want to give them short shrift.

The more important point, I think, is -- we were talking about the effective presumption; does the NLRA create an effective presumption. I think it's a lot simpler. We end up talking past each other a lot.

The basic point is that an agency-fee provision like this is a mandatory subject of bargaining. That means you need to bargain over it in good faith. It means you can't just say,

pound sand. It means you can't just close your ears. You need to have some dialogue; you need to proffer some reason.

That is a presumption -- and, again, we can fight about if the showing is big or small or something in between. But if you can't say no without some showing, that is by definition a presumption. And, again, we're not hanging our hat entirely on that; but it's the key point about why the NLRA is not neutral. It gives the unions all of these powers to extract this on their own but then supervises it on the back with the targeted support of this presumption before the NLRB.

And, again, just to the point we were talking about with discovery, before turning to the First Amendment merits, there's, I don't think, any need for discovery here because the state action question is a programmatic question. It's how this Act works. It's how it's designed. It's what the government was going for. It's not party by party. It doesn't matter whether General Motors is able to stand up to a union, or University of Chicago couldn't. It's how the statute is designed and has the government thrown its weight behind it as a matter of regulatory law and statutory law.

So that's kind of the points I have on governmental action.

Turning a bit to the First Amendment, with Janus, I think it's very important to explain what Janus said and what it didn't say; where it is relevant and where it is not.

Here, I think, is where Janus is relevant: one, it underscores that any agency fee of any stripe poses a First Amendment burden. Everyone agrees there's an infringement. Maybe they're offsetting benefits, but everyone agrees there's a burden.

Two, what Janus said is that the traditional interests on the other side of the ledger for that kind of burden don't work. My friend said Janus may have questioned it, may have not. I would urge the Court to read it. Justice Alito couldn't have been clearer. He said free ridership is an illegitimate ground. It never counts. In never counts in ordinary context. It doesn't count in labor either. And then when he rejected labor peace, the only other rationale, Justice Alito used the private sector as the reason why. Agency fees are not needed for exclusive representation as evidenced by right-to-work states.

So the interests on the other side of the ledger, none of that turned on the sector at issue. All of that was about the compelling interests on the other side. Janus eliminated them.

Now, I would agree on the First Amendment burden side -- or on the burden side, a key part of Janus was that any time you give money to a public-sector union, that's political speech because public-sector unions affect public policy by design. Hours, wages, whatever, all of that is public policy.

We're not saying that. We're not saying every dime that goes to a private-sector union has the same infirmity. But all of that is a question about burdens. And as we've explained in our brief, we have distinct burdens different from a normal private-sector agency fee. Janus does not discuss that at all.

And that relates to the other points too. My friend was talking about Hanson and Street and all of that. I disagree with how he reads those cases. Reasonable minds might be able to disagree. It's really hard to disagree after Janus because Justice Alito rejected everything he said pretty expressly. He said Janus -- or he said Hanson is a very narrow opinion that merely rejected a facial challenge. He said that in cases like Street, they didn't touch the Constitution at all.

And a key part there too -- as my friend was trying to kind of conjure a constitutional holding from constitutional avoidance. But the key part there, as I would urge the Court to look at those cases, the litigants there were not challenging agency fees writ large. They were challenging that their agency fees were being used for certain political expenditures. And the court took those challenges on those terms. These are narrow decisions that decided the case in controversy before them. They did not paint in this broad brush.

Here, though, is one point where I would completely agree with my friend: constitutional avoidance cases sometimes tell you a lot about the constitutional issues. But the way that's relevant, and where this Court should look, is the exclusive representative cases and the duty for fair bargaining case -- or duty for fair dealing cases.

What the Court has said for 80 years, from this -- the creation of the NLRA to cases like Vaca, all the way through Janus, is that in light of all of the powers that the NLRA gives to unions, it would be really bad if the Constitution never applied.

So the entire reason that the Court grafted onto the NLRA this duty of fair representation was to avoid the constitutional ill that would follow from unions being able to discriminate on the basis of race, gender, religion, what have you. So the constitutional nugget in those cases is that unions are sometimes governmental actors. Not always. Not never. Sometimes. It depends whether the government has thrown its weight behind the decision at issue.

On the merits -- just on the benefits side of the merits, my friend mentioned that they would make arguments later as to whether there's justifications here. But they have the same burden that the government would as a governmental actor. It is their burden, once we show a First Amendment infringement at this stage in the proceeding, to make some

effort to say there is an offsetting benefit that can survive exacting scrutiny. They don't mention it once in their briefs, didn't mention it here. At most, I understood my friend to be pressing this free ridership argument. But that's the exact argument that Justice Alito expressly rejected in Janus. It's not viable. I think their side of the ledger is blank.

The final point I would say -- I know I'm running a little bit long. But the final point I would say is that my friends are saying that, you know, there's no restriction really here at work; people are free to write and teach and do whatever they want, but just so long as they give us an agency fee first.

That could not be more wrong just as a matter of reality for our members. And this is a deeply painful decision that they've been put to. Some are opting out of research activities because they cannot bring themselves to associate with this union. Others are suffering under having to violate their conscience versus being kicked out of this country. This is the exact sort of burden that the First Amendment was supposed to solve for. And I do not think the government action doctrine shields what is intuitively and fundamentally a tremendous First Amendment problem here.

THE COURT: Thank you, Mr. Graver. And thank you, Mr. Luscombe. Indeed, my thanks to counsel on both sides for a very well-presented argument here, both orally and in writing.

I will take the motions under advisement. There's some weighty stuff here, so we will endeavor to rule as quickly as we can. It would be a fool's errand to try to predict when we will get a ruling out, but we will try to move it along smartly, given the issues at play.

I do thank you all for coming in. I do believe that in-person hearings are generally better. And thank you for the professionalism you've brought to this case. Again, the matter is under advisement. Thank you.

(Concluded at 3:02 p.m.)

* * * * *

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/ Nancy C. LaBella *February 7, 2025*
Nancy C. LaBella, CSR, RDR, CRR
Official Court Reporter